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July 2, 2007

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Room TW-A325
Washington, DC 20554

Re: Reexamination of Roaming Obligations of Commercial Mobile Radio Service
Providers; WT Docket No. 05-265

Dear Ms. Dortch:

On May 1, 2007, Christine Gill and David Rines of McDermott Will & Emery, LLP, on behalf of Southern Communications Services, Inc. d/b/a SouthernLINC Wireless ("SouthernLINC Wireless") met with members of the staff of the Wireless Telecommunications Bureau to discuss the importance of, and significant public interest in, the inclusion of roaming for data services in any decision or action that the Commission may take in this proceeding.¹ This memorandum is provided as a follow-up to this meeting and is intended to provide the Commission with a more detailed discussion and analysis of the public interest in automatic roaming for all services, including data, as well as the Commission's authority to take action regarding automatic roaming for all voice and data services.

I. The Public Interest in Roaming for Data Services

Wireless data services like text messaging and e-mail have rapidly become a highly valued and indispensable aspect of wireless services. Consumer use of and reliance on mobile data services – which are marketed primarily as an addition to or bundled with mobile voice services utilizing a single phone – is rapidly expanding. For example, CTIA commissioned Ovum, a highly respected international research and consulting firm, to conduct an in-depth study and analysis of the impact of the U.S. wireless telecommunications industry on the U.S. economy. Using conservative figures and assumptions, Ovum estimated that the use of wireless data applications in the United States resulted in an economic benefit through productivity gains of more than \$8.5

¹ / SouthernLINC Wireless Notice of *Ex Parte* Presentation, WT Docket No. 05-265 (filed May 2, 2007).

billion in 2004 alone.² The Ovum report also projected the productivity gains resulting from the use of wireless data services would result in an annual economic benefit in the United States of approximately \$13.1 billion in 2005, \$63 billion in 2010 and \$85.5 billion in 2015. According to Ovum, additional wireless applications that will emerge over the next five years will increase these identified gains “exponentially.”³ Looking at mobile wireless broadband connections, the Commission recently noted that this sector of the wireless data market had increased rapidly from 380,000 in June of 2005 to 3.1 million in December of 2005 and to 11 million in June of 2006.⁴

But mobile data is more than an indispensable business tool – as users of BlackBerry and like services will attest – or a source of personal and economic productivity. It is also fulfilling an increasingly important, multi-faceted role in addressing vital public interest needs.

To begin with, the industry itself uniformly recognizes that mobile data services such as text messaging save lives.⁵ In emergency situations when voice networks may not be available due to traffic congestion or other factors, wireless data services offer a critical, even life-saving, alternative means of communication. As noted by the Katrina Panel established by the Commission in 2006, “text messaging was used successfully during the crisis and appeared to

² / David Lewin and Roger Entner, Ovum, *Impact of the U.S. Wireless Telecom Industry on the U.S. Economy: A Study for CTIA – The Wireless Association*, September 2005 (“Ovum Report”) at 21. A copy of the full Ovum Report is available through the CTIA website at http://files.ctia.org/pdf/Final_OVUM_Indepen_Report_Economy.pdf.

³ / *Id.* at 31-34.

⁴ / *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data in Interconnected Voice Over Internet Protocol (VoIP) Subscribership*, WC Docket No. 07-38, Notice of Proposed Rulemaking, FCC 07-17 (rel. April 16, 2007), at ¶ 7.

⁵ / CTIA – The Wireless Association has a page on its website designed to inform consumers of the life-saving potential of text messaging, including the ability to communicate in times of emergency, the use of text messaging for wireless “AMBER Alerts,” and so forth. See http://www.ctia.org/consumer_info/safety/index.cfm/AID/10672 (last visited June 29, 2007). A printout of this webpage is provided as Attachment 1.

This CTIA webpage also includes a link to a video interview with a plane crash survivor who used text messaging to contact rescuers who saved her life. This interview is available at mms://wm.streamingmediahosting.com/ctiawireless/ctia/text_book_wireless_safety_512k.wmv (last visited June 29, 2007).

offer communications when the voice networks became overloaded with traffic.”⁶ Without access to roaming, people caught in this type of emergency would be cut off from communications. In addition, for Emergency Alert Services (EAS) – a new area of Commission focus – it will certainly be important to consider coverage for roamers for what will likely be data-based alert services. The intent of EAS is to provide the public with critical, time-sensitive information that allows people to take action to preserve life and property. People should not be deliberately excluded from receiving potentially life-saving information simply because they are relying on roaming service when a disaster or other emergency strikes.

Furthermore, certain segments of the population, such as the hearing impaired, may depend to a greater degree on wireless data services, thus making these services an indispensable communications tool.⁷ The Commission has long placed the utmost importance on the ability of persons with disabilities to access and utilize communications, as demonstrated most recently by the Commission’s Order extending Section 255 and Telecommunications Relay Service (TRS) obligations to interconnected VoIP service providers.⁸ The Commission should ensure that a lack of roaming for data services does not become another barrier to the ability of persons with disabilities to communicate.

Finally, any attempt to draw a line between roaming for voice versus roaming for data may be proven futile in the not too distant future. Changes in mobile services technology, particularly a shift to the use of VoIP for the provision of CMRS voice services, will further blur the line between “voice” and “data,” thus quickly rendering any Commission roaming policy limited to traditional “voice” services obsolete.

American society is highly mobile, and – whether by design or by circumstance – the American public travels frequently. With the rapidly changing and ever-expanding market for data services, along with the increasing role such services play in facilitating communication, access to wireless data services is equally critical to all members of American society. Accordingly,

⁶ / Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, *Report and Recommendations to the Federal Communications Commission*, June 12, 2006, at 9 -10.

⁷ / See, e.g., Phil Carson, “Wireless Messaging Critical for Deaf Community,” RCR Wireless News, Nov. 13, 2006, at 6. A copy of this article is provided as Attachment 2.

⁸ / *IP-Enabled Services; Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, WC Docket No. 04-36; WT Docket No. 96-198; CG Docket No. 03-123; CC Docket No. 92-105, Report and Order, FCC 07-110 (rel. June 15, 2007) (“*VoIP Disabilities Access Order*”).

there is as compelling a public interest in developing a sound policy for data roaming as there is for voice roaming services.

A sound policy for data roaming is particularly important for consumers in rural and underserved areas. These consumers should be able to have the benefits of wireless data services through roaming when they leave their home carrier's footprint. Without roaming, these consumers will suffer from a "wireless divide" similar to (and even compounding) the "digital divide" in the broadband services that the government is seeking to eliminate. As some have noted, wireless may be one of the best options for bringing broadband to the rural areas of the country. Rural users, however, should not lose the "mobility" aspects inherent in wireless technology because they cannot avail themselves of roaming for data services when traveling outside their home carrier's network. As the analysis below demonstrates, the Commission can adopt a coherent roaming policy that will include both voice and data and serve the American public well by ensuring inclusion of all services in a pro-consumer regulatory framework.

Consequently, the Commission should utilize this proceeding to address the issue of full and fair access to all mobile wireless services. Fortunately, despite the array of different services offered at the retail level, automatic roaming at the wholesale level is essentially a single service and the legal framework for addressing it is straightforward.

II. Analysis of Automatic Roaming Under Title II of the Communications Act

There is ample legal basis for the Commission's authority to take action regarding roaming for all voice and data services under Title II of the Communications Act. As set forth below, roaming should be treated as a wholesale service for purposes of statutory and regulatory classification. An analysis of automatic roaming at the wholesale level demonstrates that it is a telecommunications service subject to the provisions of Title II. This conclusion is fully supported by the statutory provisions of the Communications Act and Commission precedent, and is consistent with the Commission's prior decisions on cable modem and wireline and wireless broadband Internet access services, as well as the Supreme Court's decision in the *Brand X* case.⁹

A. The Regulatory Status of Roaming Must be Analyzed at the Wholesale Level

The first step in determining the scope of Commission authority over a service is to define the service itself – *i.e.*, automatic roaming.

As described by the Commission, automatic roaming allows a subscriber of one wireless service provider to utilize the facilities of another wireless service provider to initiate or receive communications without taking any special actions (*e.g.*, providing a credit card number,

⁹ / *Nat'l Cable Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005) ("*Brand X*").

inserting a different SIM card, etc.).¹⁰ There is no contractual or other service arrangement between the roamer and the host carrier that operates the roamed-on system. Rather, “[a]utomatic roaming requires a pre-existing contractual arrangement between the [roamer’s] home [carrier] and the roamed-on host system.”¹¹ In other words, a retail end user can obtain access to automatic roaming only if the end user’s home carrier has an automatic roaming agreement with the host carrier.

Because the transaction and contractual relationship for the service is between two carriers, the provision of automatic roaming is a wholesale service that must be analyzed at the wholesale level.¹² Thus, the nature of the Commission’s authority depends on the statutory classification of wholesale automatic roaming, and the classification of the retail service provided to the ultimate end user via automatic roaming is irrelevant.¹³ This analytical framework was most recently

¹⁰ / See *Reexamination of Roaming Obligations of Commercial Mobile Service Providers*, WT Docket No. 05-265, Memorandum Opinion & Order and Notice of Proposed Rulemaking, 20 FCC Red 15047, 15049 ¶ 3 (2005) (“*Roaming NPRM*”).

¹¹ / *Id.*; See also *Id.* at note 9 (“Before a subscriber can complete an originating call under an automatic roaming arrangement, the host system first identifies the subscriber’s home carrier...verifies that it has an automatic roaming arrangement with that carrier, and queries the home carrier to verify that the subscriber’s account is current (and in some instances to obtain information about the subscriber, such as his or her preferred service features).”) (emphasis added).

¹² / See *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Memorandum Opinion and Order, 22 FCC Red 3513, 3517, note 19 (2007) (“*Time Warner Order*”) (“To resolve the confusion over the meaning of ‘wholesale,’ we affirm the longstanding Commission usage of a wholesale transaction of a service or product as an input to a further sale to an end user, in contrast to a retail transaction for the customer’s own personal use or consumption.”).

In an economic report submitted earlier in this proceeding, Dr. David S. Sibley, Professor of Economics at the University of Texas at Austin and the former chief economist for the US Department of Justice’s Antitrust Division, performed a market analysis demonstrating that automatic roaming is a wholesale service. See Reply Comments of Leap Wireless, WT Docket No. 05-265, Attachment A (filed Jan. 26, 2006). Other leading economists have reached a similar conclusion. See, e.g., Comments and Reply Comments of SouthernLINC Wireless, WT Docket No. 05-265 (filed Nov. 28, 2005, and Jan. 26, 2006, respectively) (economic reports of Dr. R. Preston McAfee, Professor of Business, Economics and Management, California Institute of Technology); Comments and Reply Comments of Leap Wireless, WT Docket No. 05-265 (filed Nov. 28, 2005, and Jan. 26, 2006, respectively) (economic analyses by ERS Group).

¹³ / See *Time Warner Order*, 22 FCC Red at 3520-21 ¶ 15.

employed in the *Time Warner Order* adopted in March 2007 by the Wireline Competition Bureau.

In that case, Time Warner sought interconnection pursuant to Section 251 of the Act to provide wholesale telecommunications services to other service providers, including providers of VoIP services. In its *Order*, the Wireline Competition Bureau confirmed that providers of wholesale telecommunications services enjoy the same rights as any telecommunications carrier, including interconnection rights under Section 251 of the Communications Act.¹⁴ The Bureau further concluded that the classification of the service provided to the ultimate end user “has no bearing on the wholesale provider’s rights as a telecommunications carrier” and clarified that “the statutory classification of a third-party provider’s VoIP service as an information service or a telecommunications service is irrelevant to the issue of whether a wholesale provider of telecommunications may seek interconnection under sections 251(a) and (b).”¹⁵

The same analysis applies to automatic roaming. Like the service at issue in *Time Warner*, automatic roaming is a wholesale service provided by one carrier to a requesting carrier, which then uses that wholesale service to provide a separate retail service to its own subscribers (the ultimate end users). It does not matter whether the retail service provided by the requesting carrier to the ultimate end user is a telecommunications service (e.g., voice) or an information service (e.g., BlackBerry), because the classification of this separate retail service is irrelevant to the classification of the wholesale input used to provide the retail service.¹⁶ Accordingly, the analysis of automatic roaming must focus on the nature of the service provided at the wholesale, not the retail, level.

B. Roaming is a Telecommunications Service

The next step in the inquiry is to determine the nature of the service that is being offered. This analysis looks at the service that is being provided to the user, as perceived from the user’s perspective.¹⁷ In the case of automatic roaming, the user is the carrier who is purchasing wholesale automatic roaming service. From the carrier’s perspective, the finished service that it expects to receive (and pay for) pursuant to its roaming agreement is the transport by the host carrier of communications over its system to and from the requesting carrier’s roaming

¹⁴ / *Time Warner Order*, 22 FCC Rcd at 3517 ¶ 9.

¹⁵ / *Time Warner Order*, 22 FCC Rcd at 3520-21 ¶ 15.

¹⁶ / *Id.*

¹⁷ / See, e.g., *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, FCC 07-30 (rel. March 23, 2007) (“*Wireless Broadband Internet Access Declaratory Ruling*”), at ¶ 30; *Brand X*, 545 U.S. at 990.

subscriber.¹⁸ As discussed below, automatic roaming is properly classified as a telecommunications service.

1. Automatic Roaming is “Telecommunications”

The Communications Act defines “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”¹⁹ Automatic roaming clearly meets this definition.

Through a roaming agreement, the requesting carrier – *i.e.*, the carrier that is purchasing the automatic roaming service – specifies that traffic be transmitted between its network and the roaming subscriber’s device (as identified through the device’s Mobile Identification Number, phone number, IP address, etc.). The host carrier does not change the form or content of the information sent to or received by the roamer, nor does the host carrier provide additional services or functionalities.²⁰

BlackBerry service provides an example that illustrates the difference between wholesale roaming service and a retail data service. When “Carrier A” offers retail BlackBerry service to its retail customers, it is Carrier A that markets and sells the BlackBerry service, sells the handset (in most cases), has the direct contractual relationship with the retail customer, and provides its retail customer with the BlackBerry functionality (through Carrier A’s contractual relationship with RIM), such as e-mail, etc. In other words, the retail customer’s entire relationship is with and through the customer’s “home” carrier.

When Carrier A’s BlackBerry customers roam onto Carrier B’s network, the only service that they receive from Carrier B is the transmission of signals to and from their BlackBerry devices. Carrier B does not provide the roamer with any service or functionality that generates, processes, or stores information. Rather, it is Carrier A – the roaming retail customer’s home carrier – that

¹⁸ / See *Wireless Broadband Internet Access Declaratory Ruling* at ¶¶ 30 – 31.

¹⁹ / 47 U.S.C. § 153(43).

²⁰ / Although the host carrier does not change the form of the actual content of the information (e.g., the text of an e-mail), the host carrier does change the content of the “datagram” (*i.e.*, the “address” used in routing the transmission) that is transmitted from the roamer in order to route the datagram correctly through the IP network. However, this does not affect the analysis set forth herein, since the datagram is a capability used in the management of a telecommunications service (in this case, transmission of the communication) and is thus excluded from the definition of an “information service.” See 47 U.S.C. § 153(20).

is providing the customer with these services and functionalities via the transmission path provided by Carrier B to Carrier A for automatic roaming.²¹

As this example illustrates, wholesale roaming is a pure transmission service that meets the statutory definition of telecommunications.

However, as the Commission has made clear in its declaratory rulings on cable modem and other broadband Internet access services, the inquiry does not end here.²² It is then necessary to determine whether roaming is a telecommunications service.

2. Automatic Roaming is a “Telecommunications Service”

The Act defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”²³ As demonstrated above, wholesale roaming is a transmission service that is provided to other carriers for a fee through roaming agreements.²⁴

As stated in the *Time Warner Order*, “[i]t is clear under the Commission’s precedent that the definition of ‘telecommunications services’ is not limited to retail services, but also includes wholesale services when offered on a common carrier basis.”²⁵ The Commission has consistently held that roaming is a common carrier service,²⁶ and carriers participating in this

²¹ / This example also illustrates the fact that a roaming customer would not be able to receive any service when roaming that is not also provided by the customer’s home carrier.

²² / See, e.g., *Wireless Broadband Internet Access Declaratory Ruling* at ¶ 30; *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4823 (2002) (“*Cable Modem Declaratory Ruling*”), *aff’d sub nom, Nat’l Cable Telecomms. Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005).

²³ / 47 U.S.C. § 153(46).

²⁴ / See *Time Warner Order*, 22 FCC Rcd at 3518 ¶ 12 (The Commission has affirmed that there is “no basis in the statute, legislative history, or FCC precedent for finding the reference ‘to the public’ in the statutory definition to be intended to exclude wholesale telecommunications services.”) (internal citations omitted).

²⁵ / *Id.*

²⁶ / See, e.g., *Roaming NPRM*, 20 FCC Rcd at 15048 ¶ 2 (citing *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, Second Report and Order and Third Notice of Proposed Rulemaking, 11 FCC Rcd 9462, 9464 (1996)).

proceeding have represented that they are holding out wholesale automatic roaming to other technically compatible carriers.²⁷

Moreover, as clarified in the *Time Warner Order*, it is irrelevant whether the ultimate retail service being provided via wholesale automatic roaming is a telecommunications service or an information service, since this “has no bearing” on the appropriate classification of the underlying wholesale service.²⁸ As the Commission held in the *Cable Modem Declaratory Ruling*, the statutory classification of a service “rests on the function that is made available” to the customer²⁹ – in this case, the function (transmission) that is made available to the carrier who is purchasing wholesale automatic roaming service.

Because it is properly classified as a telecommunications service, the provision of wholesale automatic roaming is subject to the provisions of Title II of the Communications Act. This result is consistent with the Commission’s long-standing position that roaming is a common carrier service.³⁰

3. This Analysis is Consistent with FCC and Federal Court Precedent

The determination that wholesale automatic roaming is a telecommunications service, regardless of whether the retail service provided to the ultimate end user is a telecommunications service (e.g., voice) or an information service (e.g., data), is consistent with Commission precedent and with the Supreme Court’s decision in the *Brand X* case.

The Commission has issued a series of declaratory rulings and orders classifying the provision of broadband Internet access over various platforms – cable modem, wireline, Broadband over Power Line, and wireless – as “information services.” In each of these cases, the Commission determined that although the transmission component of these broadband Internet access services is “telecommunications,” it is not a “telecommunications service” because, as provided to the user, the transmission component was “part and parcel” of a functionally integrated, finished Internet access service and was not being offered on a stand-alone basis.³¹ The Commission’s

²⁷ / See, e.g., Comments of Verizon Wireless at 11 – 12; Comments of Cingular Wireless at 11 – 12; Comments of T-Mobile at 3; Comments of Alltel at 3.

²⁸ / *Time Warner Order*, FCC Rcd at 3520-21 ¶ 15.

²⁹ / *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4821, ¶ 35.

³⁰ / See, e.g., *Roaming NPRM*, 20 FCC Rcd at 15048 ¶ 2.

³¹ / *Wireless Broadband Internet Access Declaratory Ruling* at ¶¶ 29 – 31; *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4823, ¶¶ 39 – 40; *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14910-14911, ¶ 104 (2005) (“*Wireline Broadband Internet Access Services Order*”) (full caption omitted); *In the Matter of United Power Line Council’s*

approach was supported by the Supreme Court in *Brand X*, in which the Court held that the definition of a service or product offered by a company is determined by “what the consumer perceives to be the integrated finished product” that is being provided.³²

However, the service in question in each of these cases was a retail service – broadband Internet access received and paid for by retail end users. With wholesale automatic roaming, on the other hand, the finished product being provided to the user – *i.e.*, the carrier customer – is transmission, without additional service or functionality of the type identified by the Commission as characteristics of an information service component, such as generating, acquiring, storing, transforming, processing, retrieving, or utilizing information.³³ These “information service” components are offered by the carrier customer to its own retail subscribers.

In other words, there is not a “separate” transmission component to automatic roaming service because, when provided at the wholesale level on a carrier-to-carrier basis, the finished service that the carrier customer expects to receive (and pay for) *is* transmission. The Commission acknowledged this distinction when it pointed out that if a wireless broadband Internet access provider chooses to offer the transmission component as a stand-alone service, “then it is a common carrier service subject to Title II.”³⁴ Since it is clear that the nationwide carriers offer wholesale roaming as a stand-alone service, the traditional common carrier obligation to offer this service on a just, reasonable and non-discriminatory basis would apply. The determination that automatic roaming is a telecommunications service is therefore distinguishable from, and consistent with, the Commission’s rulings on broadband Internet access services and the Supreme Court’s *Brand X* decision.

Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281, 13289, ¶ 14 (2006) (“*BPL-Enabled Internet Access Services Order*”).

³² / *Brand X*, 545 U.S. at 990.

³³ / See 47 U.S.C. § 153(20) (definition of an “information service”). Note that the statutory definition of an “information service” explicitly excludes “any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service” – *i.e.*, signaling and routing information, billing information, etc.

³⁴ / *Wireless Broadband Internet Access Declaratory Ruling* at ¶ 33 (citing *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14909-14910, ¶ 103).

C. The Applicability of Section 332

In light of certain determinations made by the Commission in its recent declaratory ruling on wireless broadband Internet access services, it is necessary to address the applicability of the “commercial mobile services” provisions of Section 332 of the Communications Act.

Specifically, the Commission concluded that wireless broadband Internet access is not a “commercial mobile service” because it is not an “interconnected service” as defined in Section 332(d)(2) of the Act and the Commission’s implementing regulations.³⁵ However, the analysis used by the Commission in that case does not apply to wholesale automatic roaming services.

The Commission’s analysis in the *Wireless Broadband Internet Access Declaratory Ruling* addresses a retail “information service” provided to retail customers, of which transmission – whether via the retail customer’s “home” network or via automatic roaming – is only one component. By contrast, automatic roaming is a wholesale “telecommunications service” provided to wholesale customers and, pursuant to the Commission’s holding in the *Time Warner Order*, the classification of any retail service being provided via wholesale automatic roaming – whether as an “information service,” a “commercial mobile service,” etc. – has no bearing on the classification of the underlying wholesale automatic roaming service.³⁶ Accordingly, the Commission’s determination that wireless broadband Internet access service is not a “commercial mobile service” is irrelevant with respect to automatic roaming.

Furthermore, it is not even necessary to make a determination as to whether automatic roaming is a “commercial mobile service” under Section 332 in determining the extent of the Commission’s authority. As discussed above, automatic roaming is a telecommunications service and is thus subject to the provisions of Title II of the Act, regardless of whether it may also be considered a “commercial mobile service.” Thus, while Section 332 also provides a basis for the Commission to act on roaming for all services, this basis is parallel to and does not affect the Commission’s separate Title II authority.

III. Title III Authority Over All Radio Services

In addition to, and independent of, its authority under Title II, the Commission is also empowered to take action regarding roaming for all services pursuant to its plenary authority under Title III of the Communications Act to regulate the use of radio spectrum, regardless of the nature or classification of the service being provided.

Under Title III, it is irrelevant whether the service being provided is voice or data, whether it is a “telecommunications” or “information” service, whether it is being provided on a common carrier or private carrier basis, or even whether it is interconnected with or otherwise “touches”

³⁵ / *Wireless Broadband Internet Access Declaratory Ruling* at ¶ 42.

³⁶ / *Time Warner Order*, 22 FCC Rcd at 3520-21 ¶ 15.

the public switched network.³⁷ Therefore, pursuant to its statutory mandate under Section 301, the FCC is empowered to regulate mobile data service – including through the imposition of roaming obligations that encompass data as well as voice services – as a means of efficiently managing the use of the nation’s radio spectrum.

The best example of the Commission’s use of its Title III authority to impose common carrier obligations on CMRS providers is the CMRS resale rule. Although this rule “sunsetting” by its own terms in 2002 and is no longer in effect, it still provides valuable precedent and guidance due to its use of Title III to extend common carrier resale obligations – including Section 201 and 202 obligations – to data and other non-Title II services provided by CMRS carriers.³⁸ In fact, as demonstrated below, there are substantial parallels between the situation the FCC was addressing at the time of the resale rule and the current situation with automatic roaming.

When it adopted the CMRS resale rule, the Commission explicitly rejected AT&T’s claim that any resale obligation should apply only to services that are regulated under Title II. The Commission explained that it was “concerned ... that excluding from the resale rule all bundled packages that include non-Title II components would potentially offer carriers an easy means to circumvent the rule.”³⁹ The Commission reaffirmed its position three years later when it rejected certain challenges to the CMRS resale rule, stating in its 1999 *Resale MO&O*:

Arguments that the scope of the resale rule is overbroad because it extends to non-Title II services are inapt. In the *First Report and Order*, the Commission rejected this argument and specifically cited its licensing authority as part of its

³⁷ / See *Wireless Broadband Internet Access Declaratory Ruling* at ¶¶ 35 – 36 (holding that the classification of wireless broadband Internet access service as an “information service” does not affect the general applicability of Title III to this service, since the service is using radio spectrum).

³⁸ / See *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, First Report and Order, 11 FCC Rcd 18455, 18459 – 18460 (1996) (“*First Resale Report and Order*”) (“Accordingly, we condition existing and future cellular, broadband PCS and covered SMR licenses upon compliance with our resale rule pursuant to our authority under Title III of the Act.”) (citing 47 U.S.C. §§ 303(r) and 309); See also *Id.* at 18468 (“[T]o the extent that a CMRS provider offers interstate service, an unjust or unreasonable resale practice or unjust or unreasonable discrimination against resellers may be the subject of a complaint alleging a statutory violation under Section 208 of the Act. . . Of course, to the extent a [covered CMRS] provider violates our [resale] rule adopted here, a Section 208 complaint concerning such rule violation may be filed regardless of whether the service is interstate or intrastate.”).

³⁹ / *First Resale Report and Order*, 11 FCC Rcd at 18471 – 18472.

jurisdictional authority for the resale rule. No party has challenged our explicit invocation of Title III as a basis for imposing the resale rule.⁴⁰

In the *Resale MO&O*, the Commission decided to eliminate customer premises equipment (CPE) and CPE in bundled packages from the scope of the CMRS resale rule. But the Commission stated that it was retaining the rule for bundled packages that included “enhanced services” because “at least as CMRS enhanced services are presently provided, neither subscribers nor resellers can purchase the service component of the bundle from one provider and the enhanced services component of the bundle from another provider.”⁴¹ According to the Commission:

Although AT&T and others argue that the market for enhanced services is competitive, MCI points out that the technology that allows a reseller to provide enhanced services resides predominantly in the mobile carrier’s network rather than in the mobile CPE. Absent extension of the resale rule to bundled packages, a provider could unilaterally deny a reseller contractual access to its enhanced services, and the reseller would be unable to recreate a bundle that includes these services.⁴²

The Commission also rejected in this Order yet another request from AT&T and certain other carriers for an exemption from the CMRS resale rule, this time for “data services provided using cellular or broadband PCS spectrum.”⁴³ The Commission responded that it continued to believe that it would be “imprudent to distinguish between data services and other services offered using CMRS spectrum.”⁴⁴ According to the Commission, “Such a rule would be difficult to enforce because there are no usage restrictions applicable to CMRS licensees, and it would be difficult to determine, as an enforcement matter, whether a particular licensee was using its spectrum to transmit voice or data.”⁴⁵

The parallels between the situation for resellers vis-à-vis access to non-Title II services in the 1990’s and the situation faced by the non-nationwide CMRS carriers with respect to roaming for voice and data services are significant, and these parallels strongly support the use of Title III as

⁴⁰ / *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, et al., Memorandum Opinion and Order and Order on Reconsideration, 14 FCC Rcd 16340, 16352-53 ¶ 27 (1999) (“*Resale MO&O*”) (internal citations omitted).

⁴¹ / *Resale MO&O*, 14 FCC Rcd at 16354-55 ¶ 30.

⁴² / *Resale MO&O*, 14 FCC Rcd at 16354-55 ¶ 30.

⁴³ / *Resale MO&O*, 14 FCC Rcd at 16366-67 ¶ 57.

⁴⁴ / *Resale MO&O*, 14 FCC Rcd at 16367 ¶ 59.

⁴⁵ / *Resale MO&O*, 14 FCC Rcd at 16367 ¶ 59.

the jurisdictional basis for the Commission to adopt automatic roaming obligations for all mobile services, including data.

Beyond the CMRS resale rule, there are numerous additional examples of the broad scope of the Commission's authority over the operations of Title III licensees. For instance, the Commission regulates providers of mobile paging and messaging services as common carriers. In addition, the Commission can – and does – impose obligations, restrictions, and conditions on the operation of private land mobile services (both voice and data). The Commission can impose equal employment opportunity obligations and reporting requirements. And, as licensees in the 800 MHz and BAS bands can attest, the Commission can force licensees to move their services to new frequencies and compel them (or other licensees) to cover all relocation expenses. In no event does the Commission's ability to exercise its Title III authority require a finding regarding the sufficiency of market forces or competition.

IV. Title I Ancillary Jurisdiction

Even assuming, *arguendo*, that Title II and Title III do not already provide sufficient authority, the Commission could nevertheless take action regarding the provision of automatic roaming for data and other services pursuant to its ancillary authority under Title I of the Communications Act. This authority allows the Commission to impose special regulatory obligations, including certain common carrier obligations, on the provision of a service regardless of how that service may otherwise be classified under the Act – *i.e.*, as a “telecommunications service” or as an “information service.”⁴⁶

The Commission may exercise its ancillary jurisdiction “when Title I of the Act gives the agency subject matter jurisdiction over the service to be regulated and the assertion of its jurisdiction is ‘reasonably ancillary to the effective performance of [its] various responsibilities.’”⁴⁷

The Commission's general jurisdictional grant is set forth in Sections 1 and 2 of the Act, which establish the Commission's authority and responsibility to make available “to all the people of the United States ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges ... for the purpose of promoting safety of life and property through the use of wire and radio communication.”⁴⁸ Section 3(33) of the Act defines “radio communication” as “the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of

⁴⁶ / See, e.g., *Brand X*, 545 U.S. at 996 (stating that the Commission “remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction”).

⁴⁷ / *VoIP Disabilities Access Order* at ¶ 22 (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968)).

⁴⁸ / 47 U.S.C. §§ 151 and 152.

communications) incidental to such transmission”⁴⁹ – a definition that clearly encompasses automatic roaming. Accordingly, the Commission has the requisite subject matter jurisdiction under Title I to regulate automatic roaming services.

The adoption of measures that would make roaming for all commercial wireless services available to all Americans under just, reasonable, and nondiscriminatory rates, terms, and conditions is, in turn, “reasonably ancillary” to the Commission’s statutory responsibilities under the Act. As discussed above, Section 1 of the Act charges the Commission with making a “rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges” available “to *all* the people of the United States,”⁵⁰ not just to people in major metropolitan areas and highway corridors.⁵¹ The availability of automatic roaming for all wireless services is also critical to the Commission’s effective performance of its responsibility under Section 1 of the Act to “promot[e] safety of life and property through the use of wire and radio communication.”⁵²

Furthermore, the adoption of measures that would make automatic roaming available for all commercial wireless services, including voice and data, would satisfy “the Commission’s responsibility to implement section 255 [of the Act] and to give full effect to the accessibility policies embodied in section 255.”⁵³

The clearest, and most recent, examples of the Commission’s exercise of its Title I authority are its decisions to impose certain Title II regulatory obligations on interconnected VoIP services and service providers – including obligations regarding Enhanced 911 services,⁵⁴ universal

⁴⁹ / 47 U.S.C. § 153(33).

⁵⁰ / 47 U.S.C. § 151 (emphasis added).

⁵¹ / See, e.g., *Rural Tel. Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988). As the Commission pointed out in a footnote to its *VoIP Disabilities Access Order*, the D.C. Circuit “upheld the Commission’s assertion of ancillary jurisdiction to establish a funding mechanism to support universal service in the absence of specific statutory authority as ancillary to its responsibilities under section 1 of the Act to ‘further the objective of making communications service available to all Americans at reasonable charges.’” *VoIP Disabilities Access Order* at note 101 (quoting *Rural Tel. Coalition*, 838 F.2d at 1315).

⁵² / 47 U.S.C. § 151.

⁵³ / *VoIP Disabilities Access Order* at ¶ 24.

⁵⁴ / *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005), *aff’d sub nom. Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006).

service contributions,⁵⁵ customer proprietary network information (CPNI),⁵⁶ and disability access and TRS⁵⁷ – even though no determination has yet been made as to whether these services are information services or telecommunications services under the Act. These decisions have consistently been upheld by the U.S. Court of Appeals for the District of Columbia Circuit.⁵⁸

As discussed in Part I of this memorandum, the availability of automatic roaming for voice and data services raises many of the same concerns that the Commission has sought to address with respect to interconnected VoIP services, including public safety and disability access. While these concerns are particularly acute for those who live, work, or travel in or through rural and underserved areas, the breakneck speed at which wireless technologies and services are changing – coupled with ever-increasing industry consolidation – make these concerns an issue for all Americans, regardless of where they may be located. Accordingly, the Commission can address these concerns by exercising its Title I authority to formally extend the obligations of Sections 201 and 202 of the Act to the provision of wholesale automatic roaming for all wireless services and to formally make available the remedies set forth in Section 208 of the Act in order to ensure that these obligations are met.

V. Conclusion

There is a clear and compelling public interest need for Commission action that will provide full and fair access to all mobile wireless services, including voice and data, for all Americans. As demonstrated above, the Commission possesses ample legal authority under Title II of the Communications Act to adopt a clear, coherent, and “future-proof” roaming policy that will make these services available to all U.S. consumers at reasonable rates and under reasonable and nondiscriminatory terms and conditions.

By applying the provisions of Title II – in particular, the obligations and remedies set forth in Sections 201, 202, and 208 of the Act – the Commission can establish a simple, straightforward,

⁵⁵ / *Universal Service Contribution Methodology*, WC Docket No. 06-122; CC Docket Nos. 96-45, 98-171, 90-571, 92-237, NSD File No. L-00-72; CC Docket Nos. 99-200, 95-116, 98-170; WC Docket No. 04-36, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006), *aff'd in relevant part*, *Vonage Holdings Corp. v. FCC*, 2007 WL 1574611 (D.C. Cir. June 1, 2007).

⁵⁶ / *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, CC Docket No. 96-115; WC Docket No. 04-36, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-22 (rel. April 2, 2007).

⁵⁷ / *See VoIP Disabilities Access Order* at ¶¶ 21 – 24.

⁵⁸ / *See Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006); *Vonage Holdings Corp. v. FCC*, 2007 WL 1574611 (D.C. Cir. June 1, 2007).

and pro-consumer regulatory framework for the provision of automatic roaming services. In addition to Title II, the Communications Act provides the Commission with additional, and independent, authority to take the necessary action under its plenary Title III jurisdiction over the use of radio spectrum. Finally, the Commission's ancillary Title I jurisdiction over communications services in general provides yet another basis for the Commission to take action that will provide full and fair access for all Americans to all mobile wireless services.

In so doing, the Commission can achieve its stated vision of a "seamless, nationwide 'network of networks'," fulfill its statutory charge of "promoting safety of life and property through the use of wire and radio communication," and ensure that changing technologies and industry consolidation do not result in a "wireless divide" in the United States.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Christine M. Gill", written over the typed name.

Christine M. Gill

Counsel for SouthernLINC Wireless

cc: Chairman Kevin J. Martin
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell
Erika Olsen
Bruce Gottlieb
Barry Ohlson
Aaron Goldberger
Angela Giancarlo
Fred Campbell
John Branscome
Christina Clearwater
Nese Guendelsberger
Won Kim
Heidi Kroll
Paul Murray
Louis Peraertz
Blaise Scinto
Walter Strack

ATTACHMENT 1

**Printout of CTIA – The Wireless Association’s Webpage On Text Messaging
(http://www.ctia.org/consumer_info/safety/index.cfm/AID/10672)**



CTIA is the International Association for the Wireless Telecommunications Industry, Dedicated to Expanding the Wireless Frontier.

“Text”book Wireless Safety

America is in the midst of text messaging mania. According to the latest survey from CTIA-The Wireless Association®, 158 billion text messages were sent in 2006. That’s a 95% increase from 2005, and translates into approximately 300,000 text messages per minute!

Text messaging, which is formally known as Short Messaging Service (SMS), equips wireless consumers with a unique safety tool that enables people to respond to emergency situations almost no matter where they are. Text messaging not only makes it easy to stay connected to friends and family, it can also be a life-saver.

Text During Times of Disaster or Emergency:

The amount of data in a text message is significantly less than that which is in a digital phone call.

That’s why when disasters strike and communications networks might be challenged, or if network coverage is particularly difficult in a remote area, text messages can be the most effective way to communicate via your wireless device.

Text to Help Save Lives:

The Wireless AMBER Alerts initiative is a great example of how text messaging technology can be used to help save lives.

Now when an AMBER Alert is issued, the same information displayed on electronic highway signs can be displayed on cell phones.

Sign up today at no cost. Then, if an Alert is issued in your area, you’ll receive a free text message that could aid in the recovery of an abducted child.

Text Responsibly:

There’s a time and a place for texting, and behind the wheel is not one of them.

Be responsible...Don’t Text and Drive.

CTIA 1400 16th Street, NW, Suite 600, Washington, D.C. 20036 202.785.0081

ATTACHMENT 2

**Phil Carson, "Wireless Messaging Critical for Deaf Community,"
RCR Wireless News, Nov. 13, 2006, at 6**

Wireless messaging critical for deaf community

Devices figured in recent, successful student protests

BY PHIL CARSON

The advent of interactive pagers and the march of wireless technology for text-based applications since that seemingly distant time have been a boon for the deaf community, though technology useful to the deaf continues to lag behind some practical needs, particularly in the realm of emergency communications.

The deaf community is difficult to define, given widespread reluctance to list oneself as hard of hearing or deaf, according to the Gallaudet Research Institute, affiliated with Gallaudet University in Washington, D.C.

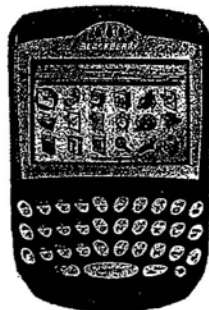
Gallaudet, the nation's leading university specifically for deaf students, was recently in the news when student protesters, aided by wireless devices, succeeded in stopping the university's choice for a new president from taking office.

Student organizers credited T-Mobile USA Inc.'s Sidekick and Research In Motion Ltd.'s BlackBerry devices for enabling them to be well-organized and responsive to fast-moving events, despite having students spread around campus. Student leader Christopher Corrigan noted the devices were critical to the protest's success.

Perhaps as many as 1 million Americans are deaf and cannot benefit from voice-based communications technology. That's out of about 30 million people of all ages who are hard-of-hearing—about 10 percent of the nation's 300 million people, according to GoAmerica Communications, which has evolved from an early, rocky focus on wireless enterprise services to serving the deaf and hearing-impaired.

Although several wireless businesses are directly addressing this space—add MCI in the carrier space and retailers Fuse Wireless, Harris Communications, Potomac Technology, United TTY Wireless to the list—and RIM has an outreach program for those with disabilities, many in the deaf community learn of solutions through their peers, according to deaf blogger Jamie Berke at deafness.guide@about.com.

"I can only answer for myself, personally," Berke wrote last week in response to questions. "'Word of mouth' worked in my case. When Sidekicks caught on, I bought one too. I rely on my Sidekick for three primary functions: instant messaging, Web surfing and e-mail. The other features are of less importance to me. The BlackBerry is also gaining popularity in the deaf community."



The Sidekick and BlackBerry are popular with the deaf community.

Any hurdles to deaf uptake of wireless devices and services?

"The only hurdle that I'm aware of is the difficulty of finding data-only plans," Berke wrote. "An important factor for deaf customers is that the data-only plan must be 'limitless.' I know that T-Mobile has one. I've also heard complaints about T-Mobile's coverage, which has forced some deaf people to buy alternative devices."

T-Mobile USA recently spent \$4.2 billion on 120 spectrum licenses—the largest single amount of any carrier—in the Federal Communications Commission's advanced wireless services auction to expand its coverage to compete effectively with other Tier One carriers. And, according to Kitty Weldon, analyst with Current Analysis, most large carriers offer a data-only plan to subscribers.

Troy Meyer, who attends the Oregon School for the Deaf in Salem, Ore., is also an avid Sidekick user and said the device, as well as other text-messaging devices are popular on campus.

"Most of my friends have Sidekicks, though some that have partial hearing also have cell phones," Meyer said. "Everyone likes using the Sidekicks. I use mine all the time, when talking to friends or when we are playing video games we use them to talk to each other. The teachers get mad if we use them in class, so we don't do that too often."

Meyer's mother, Michelle, noted that the Sidekick has been very use-

ful in letting her get in touch with Troy when he is at school or out with his friends. Meyer added that T-Mobile USA seemed familiar with people requesting the \$30 per month data-only package for the Sidekick.

At RIM, Robert Crow, vice president for government and university relations, helped found a program for persons with disabilities that began by addressing the needs of the deaf.

"That first interactive pager—according to testimonials given to me over the years—gave deaf people flexibility and mobility," Crow said. "It gave them a degree of serendipity in their day, not having to stick to a pre-planned schedule."

In other words, the advancements in mobility and communications that so many enjoy actually changed the world for deaf people.

"We're not alone in this market," Crow said. "Other fine companies are in the market and they recognize that the deaf community is a decent-sized community to reach."

According to Crow, RIM approaches the deaf community not as a separate market, but according to "principles of universal design."

"If we give thought to the broadest possible range of uses for our devices, it works for the deaf community just as it works for everyone else," Crow explained.

"The second part of this, though, is that there's always been—to the best of my knowledge—a technical community often pioneered by those within the deaf community, who have proposed or identified solutions. So, over time, those folks have designed services that complement what RIM has to offer. MCI and GoAmerica have offered what's known as a 'relay service.'"

A relay service is one in which a deaf person can initiate a call via electronic means to an operator using text and the operator relays that message to a person with hearing using voice, or to a deaf person using TTY, or text telephone. That remains an important mode of communication for those who do not carry mobile devices.

"It's an evolving world," Crow said. "We have established and continued to maintain relations with non-governmental organizations with research organizations such as those at Gallaudet University to make sure we're understanding this community and knowledgeable about developments in their field of communications."

"Anytime I listen, I hear the technically oriented people saying, 'The world is going towards IP and IM, etc. And yet, as a community, we're stuck with 30-year old technology. We must find ways to evolve what we've been doing in electronic communications to the most modern forms of communications.'"

One issue on the agenda: a Federal Communications Commission hearing is expected to be held this week on emergency communications for those with disabilities, including the deaf.

RCR